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Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

and

CLARENCE E. KARN, L. D. ATKINSON AND LEO T. CROWLEY AND EDWARD J. SAMP,

Respondents,

On Appeal from the Supreme Court of the State of Wisconsin.

STATEMENT AS TO JURISDICTION ON APPEAL

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STATEMENT AS TO JURISDICTION ON APPEAL

May it Please the Court:

Appellants in support of the jurisdiction of this Court to review the above entitled case on appeal, respectfully represent:

I.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Sec. 237 Judicial Code (U. S. C. A. Sec. 344) provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ or error."

By Chap. 14, 45 Stat. at large 54, being the Act of January 31, 1928, the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

By Chap. 440, 45 Stat. at large 466, enacted April 26, 1928, the Act of January 31, 1928 was amended, providing the procedure for appeal followed in this case, and under which the appeal in this case was taken.

The appeal in this case is from the Supreme Court of the State of Wisconsin, the highest court in that state in which a judgment could be had. There was drawn in question in that suit the validity of Chapter 128, Wisconsin Statutes, and particularly of Chapter 334, Laws of 1897 of Wisconsin, (which now comprises the last fifteen lines of Sec. 128.06 and all of Sections 128.07 and 128.08, Wisconsin Statutes 1931), on the ground that the said statutory provisions in the laws of Wisconsin are suspended during the existence of the National Bankruptcy Act and the decision of the Supreme Court of the State of Wisconsin was in favor of the validity and continued operation and effect of said state laws.

II.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL

The judgment sought to be reviewed was entered by the Supreme Court of the State of Wisconsin on the 10th day of May, 1932, based upon an opinion of that court rendered and filed on the same day, reversing the judgment of the trial court. (R. 73)*

The application for appeal was presented to the Honorable Marvin Rosenberry, presiding justice of the Supreme Court of the State of Wisconsin on June 1, 1932, and the appeal was allowed on said day. (R. 5) The citation was served and filed within the time required by the rules of this court, and the record was thereafter filed and docketed in this court on June 23, 1932.

III.

NATURE OF CASE AND RULING BELOW

This case involves the question as to whether during the pendency of the National Bankruptcy Act a general assignment for the benefit of creditors under Chapter 128, Wisconsin Statutes, was effective to withdraw the property of the assignor from the reach of garnishment by a non-assenting creditor who was unable to invoke the Bankruptcy Act. The trial court held that the state statute was suspended during the existence of the National Bankruptcy Act for the reason that the National Bankruptcy Act covered the same field as that occupied by the state law, and that the National Act was exclusive. The Supreme Court, reversing the trial court, held the contrary.

The defendant, Joseph M. Boyd Company, a Wisconsin corporation, engaged in the business of selling securities,

* All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of Wisconsin and on file with the Clerk of this Court. The record has not yet been printed.

loans and other investments to the public, while insolvent did on March 23, 1931, make a general assignment of all of its property for the benefit of creditors. (R. 24).

The Circuit Court for Dane County assumed jurisdiction over the supervision of the administration of the insolvent estate pursuant to the provisions of Chapter 128, Wisconsin Statutes. (R. 37).

The plaintiff, a creditor of the Joseph M. Boyd Company, did not in any manner participate in the proceedings in the state court, and on July 30, 1931, she commenced a garnishment action against the assignees.

The creditors of the Joseph M. Boyd Company are more than twelve in number, and the plaintiff, although she used due diligence to that end, was unable to invoke involuntary bankruptcy proceedings. (R. 28).

Chapter 128, Wisconsin Statutes, regulates the order of distribution of assets of insolvents in a manner less favorable to general creditors of the plaintiff's standing than the distribution provided by the Bankruptcy Act. (R. 27).

The assignees failed to file the bond in the time, manner and amount required by said Chapter 128, and in other respects failed to comply with the statute, and under the express provisions of Section 128.06 the assignment was therefore void. (R. 25, 26).

The trial court held the assignment void both for non-compliance with the said statutory regulations in respect to the bond and for the further reason that in any event the National Bankruptcy Act suspended all state laws regulating the distribution of insolvent estates. (R. 53-66).

The Supreme Court conceded the correctness of the contention that the assignment was void for non-compliance with the statutory regulations in respect to the bond, but held that Chapter 334 of the Laws of 1897 (now a part of Chapter 128) was a valid enactment and took away from

creditors the right of garnishment, the Supreme Court saying:

> ". . . that Chapter 334 of the Laws of 1897 constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees even though the assignment would otherwise be void but for such saving clause." (R. 92).

The Supreme Court further held that the sections in Chapter 128 dealing with discharge (Sections 128.19 to 128.29) were severable from the balance of the chapter under the decision of the state court in *Re Tarnowski,* 191 Wis 279, 210 N. W. 836, and that inasmuch as those particular sections dealing with discharge had already been held to be suspended that Chapter 128 dealt merely with distribution of assets, and not with the discharge, and therefore was not an insolvency or bankruptcy law and was not suspended by the National Bankruptcy Act. (R. 91).

It was the plaintiff's contention that even though the said provisions in Chapter 128, looking toward the discharge of the debtor be separated from the balance of the chapter and discarded, even then the chapter is in conflict with the Bankruptcy Act. The state statutory provisions cover the matter of distribution of assets, which, plaintiff contends, is the primary element of a bankruptcy law. Distribution of assets under a voluntary assignment in Wisconsin is statutory.

In *Segnitz vs. Garden City Bank Co.,* 107 Wis. 171, 83 N. W. 327, the court said:

> " . . . and inasmuch as the distribution of the estate depends, not upon the will of the assignor, but upon the positive requirement of the lawmaking power, we can see no escape from the conclusion that in so far it becomes statutory, and not voluntary. "(p. 176).

In the *Matter of the Voluntary Assignment of the Milwaukee Sheep & Wool Co.*, 186 Wis. 320, 202 N. W. 693, the court said:

> "The entire procedure in an assignment is largely determined by the statute, and in order to be a valid assignment the statutory requirements must be complied with." (p. 326).

The court said further:

> "By way of reiteration, let it be said that the statutes on voluntary assignments are designed for the benefit of general, unsecured creditors. It was such object that the legislature had in mind when it enacted sec. 1701, above quoted." (p. 328)

Thus, wholly independent of the discharge provisions, the Wisconsin Court has designated its voluntary assignment law as being designed for the benefit of general unsecured creditors with a distribution of assets thereunder that is statutory, and not voluntary.

The strength of the plaintiff's contention in this respect is emphasized when it is considered that the assignor in this case is a corporation, and as to it a discharge from its debts is a mere empty formality.

The facts in this particular assignment present a stronger case of invalidity than if the assignment had been made pursuant to the regulatory provisions of the state voluntary assignment law. Had the assignment been made in compliance with the state law and been a valid, voluntary assignment, there might be some ground for claiming that the distribution thereunder was made pursuant to the will of the assignor and that it might be as a distribution wholly independent of the statute.

As we have pointed out above, this assignment was made without compliance with the statutory provisions in respect to the bond, and for that reason it was void and of no effect

except as it was saved by the provisions of Chapter 334 of the Laws of 1897. (See opinion Supreme Court, R. 92).

The Supreme Court held that Chapter 334, Laws of 1897, was a valid enactment. (R. 92). It is the plaintiff's contention that Chapter 334, Laws of 1897, incorporated into the voluntary assignment law a complete system of involuntary bankruptcy, including the discharge provision, and that it is wholly suspended by the National Bankruptcy Act.

Chapter 334, Laws of 1897, is now incorporated in the statutes and comprises the last fifteen lines of Section 128.06 and all of Sections 128.07, to 128.10 inclusive, which provisions are set forth in full in Appendix A. In effect this chapter provides that when, as in this case, an assignment is void, creditors shall not be allowed to attach or garnishee, but that the insolvent estate shall then be administered under the direction of the court by an assignee or receiver appointed by the court.

This is true, regardless of the wishes or desires of the assignor. So, from this point on, it is a wholly involuntary proceeding. The making of a void assignment is in effect made an act of bankruptcy. The whole proceeding, including distribution is statutory. Similar to the provisions of a bankruptcy law, this chapter provides that if a debtor shall confess a judgment or permit a preference by any creditor and shall not within ten days after a levy or attachment make a voluntary assignment for creditors, then two or more creditors holding two hundred dollars of claims may apply to the court, and the court may appoint a receiver who shall then administer the estate pursuant to the provisions of Chapter 128.

The Act provides that the same proceedings may be taken by the debtor for a discharge as if he had made a voluntary assignment. This is an entirely different discharge provision than was held to be suspended in the Tarnowski Case, 191 Wis., 279. It is this chapter, construed by the Supreme Court

to be a valid enactment, which it is claimed effectively took away the right of garnishment. It is this chapter which affords the remedy to which the state court limited the plaintiff. It is this chapter which the state court held to be valid in toto.

IV.

CASES RELIED UPON TO SUSTAIN THE JURISDICTION OF THE COURT

The first pleading filed in this case, namely, the garnishee affidavit, squarely raised the federal question that Chapter 128 was suspended by the National Bankruptcy Act. This question was squarely met and passed upon by the trial court. After referring to the holding of this court in *International Shoe Co., vs. Pinkus*, 278 U. S. 261, in which case the Arkansas law was held suspended, the trial court said:

> " . . . So I fail to see a substantial difference between the statutes of Arkansas and the provisions of Chapter 128 of this state, or this common law assignment, if we choose to so regard it. The difference is in words only. In either case it is an invasion of the National Bankruptcy Act and void in toto. The position of the garnishee defendants is a mere play upon words, a legal beating of the devil around the bush." (R. 60).

He said further:

> "Tested by the inevitable result of these assignment proceedings if permitted to proceed, the property of this corporation will be disposed of and distributed among such creditors as have filed their claims and the corporation be *discharged of its debts*, just as effectually as though an order of the court were made barring all creditors who have not so filed.
>
> It is simply an ingenious way of going through bankruptcy under the guise of a common law assignment. There remains, after this trust is complied with, no property of the Boyd Company and no personal liability

on the part of the stockholders. The corporation is discharged of its debts and its creditors are barred of any remedy." (R. 57).

The Supreme Court devoted its opinion almost entirely to the effect of the National Bankruptcy Act on state assignment laws and concluded that Chapter 334, Laws of 1897, constituted a valid enactment (R. 92). It concluded further that a discharge provision is not an essential of a bankruptcy law, and that a state law which provides for the distribution of the assets of an insolvent debtor, but which has no discharge provision, is not suspended by the Bankruptcy Act.

From the foregoing it is apparent that the sole question at issue both in the trial court and in the Supreme Court is as to whether the state law regulating assignments for the benefit of creditors is suspended by the National Bankruptcy Act. There was thus drawn in question the validity of a state statute on the grounds of its being repugnant to the laws of the United States, and the decision was in favor of the validity of the state statute.

Under Section 237, Judicial Code, the jurisdiction seems clear, and the following cases support this contention:

International Shoe Co. v. *Pinkus,* 278 U. S. 261.
Boese v. *King,* 108 U. S. 379.
Bryant v. *Zimmerman,* BGR *U. S.* FC.
New Orleans & N. E. R. R. Co. v. *Scarlet,* 249 U. S. 528.
Hammond v. *Whittredge,* 204 U. S. 538.

It is respectfully submitted that this court has jurisdiction and that such jurisdiction should be accordingly sustained.

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APPENDIX A

Chapter 334, Laws of 1897, was entitled,

> **"An Act to amend Chapter 80 of the revised statutes of the State of Wisconsin for the year 1878 entitled, 'Of Voluntary Assignments.'"**

The previsions of Chapter 334 are here set forth as they appear in the Wisconsin Statutes for 1931, and remain unchanged except as the sections are renumbered:

> **"128.06 . . . But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided.**
>
> **128.07 . . . Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor or a garnishment is made against such a debtor he may, within ten days thereafter, make an assignment of all his property and estate, not exempt, for the equal benefit of all his creditors, whereupon all such attachments, levies, garnishments or other**

process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver.

128.08 . . . When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby one or more of his creditors shall obtain a preference over any other of his creditors or shall omit or do any act which he might lawfully do to prevent any of his creditors from obtaining preference over his other creditors, contrary to the intent of this chapter, or if he shall not, within ten days after any levy by attachment, execution or garnishment made against him, make an assignment of all his property, as provided in the next foregoing section, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy or defend against the said levy, then, or within thirty days thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate may make a petition to the circuit court or a judge thereof in the county or circuit where such debtor resides, if a resident of this state, and if not, in any county thereof, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct to the debtor and creditors sought to be preferred or to their attorney of record, of the time and place of hearing, the court in term time or a judge in vacation shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent and has given a preference to any of his creditors over other of his creditors or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action and estate of every kind, including property attached or levied upon or garnished in the manner and subject to the limitations herein provided and of all property conveyed in violation of the

provisions of this chapter, and have charge and control of the same, and of all debts or property garnished, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due who shall prove their claims within such time and manner as the court or judge shall direct; and the court or judge shall order the debtor to file a correct inventory of his assets and a list of his creditors as provided in section 128.13; such receiver shall be appointed and all proceedings shall be had under these statutes relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this chapter into effect. The provisions of this chapter shall not apply to any payment or satisfaction, in whole or in part, of a past-due debt made in the usual course of business without any intent on the part of the creditor to evade the same. The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said debtor had made a voluntary assignment under this chapter.

128.09 . . . An insolvent person, within the meaning of this chapter, is one whose nonexempt property is insufficient in amount, at a fair valuation, to pay his debts; and when insolvency is to be inquired into, with reference to this chapter, it shall be determined as of the date of the making or attempting to make an assignment or of the giving or attempting to give any preference prohibited hereby, the issuing of an execution or attachment or the institution of garnishment proceedings against the debtor's property.

128.10 . . . In all actions authorized by this chapter appropriate provisional remedies may be had and final relief administered to the equal distribution of all assets recovered among the creditors of the debtor, and the court may make such orders for the payment of costs and expenses as may be just. An action or proceeding authorized herein for the benefit of all creditors may be taken by a creditor although his demand is not due at the commencement thereof."